TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00516-CV

Anthony J. Ross and Barbara Gayle Ross, Appellants

v.

John A. Flower and Melissa Flower, Appellees

FROM THE 155TH DISTRICT COURT OF FAYETTE COUNTY
NO. 2016V-312, THE HONORABLE JEFF R. STEINHAUSER, JUDGE PRESIDING

MEMORANDUM OPINION

Anthony J. Ross and Barbara Gayle Ross sued John A. Flower and Melissa Flower for trespass to try title and conversion and also sought a declaration regarding ownership of the mineral estate beneath a 20-acre tract of land they had conveyed to the Flowers' predecessors in interest. The parties filed cross-motions for summary judgment. The district court granted the Flowers' motion, denied the Rosses' motion, and rendered a take-nothing judgment against the Rosses. In one issue, the Rosses contend that the trial court erred by determining that they did not retain ownership of the mineral estate when they conveyed the 20-acre tract to the Flowers' predecessors in interest. We will affirm.

BACKGROUND

In 1999, the Rosses owned both the surface and mineral estates of a 20-acre tract of land in Fayette County (the Property). In April 1999, the Rosses executed a General Warranty

Deed (the 1999 Deed) that conveyed the Property to Richard and Patricia Church. The 1999 Deed provided that the Rosses:

> GRANT, SELL, and CONVEY unto RICHARD F. CHURCH and wife, PATRICIA A. CHURCH, herein referred to as "Grantee", whether one or more, the real property described on attached Exhibit "A".
>
> This conveyance however, is made and accepted subject [to] any OIL, GAS AND OTHER MINERALS, including, but not limited to BUILDING STONE, LIMESTONE, CALICHE, SURFACE SHALE, WATER, SAND, GRAVEL AND LIGNITE, IRON AND COAL and to any and all validly existing encumbrances, conditions and restrictions, relating to the hereinabove described property as now reflected by the records of the County Clerk of Fayette County, Texas.[1]

The Churches in turn conveyed their interest in the Property to Robert and Margaret Rankin, and the Rankins conveyed their interest in the Property to the Flowers. The question presented in this appeal is whether the 1999 Deed conveyed the Property's mineral estate to the Churches or whether, as the Rosses contend, the "subject-to" clause in the 1999 Deed operated to reserve or except the mineral estate from the conveyance.[2] After considering the cross-motions for

[1] Although the word "to" does not follow the word "subject" in the 1999 Deed, the parties agree that this is a "subject-to" clause. We will assume, as the parties suggest, that the omission of the word "to" was a typographical error and not intentional.

[2] Reservations and exceptions in deeds are not synonymous. *Pich v. Lankford*, 302 S.W.2d 645, 650 (Tex. 1957). A reservation is made in favor of the grantor and creates a new right issuing out of the conveyance. *Klein v. Humble Oil & Refin. Co.*, 67 SW.2d 911, 915 (Tex. App.—Beaumont 1934), *aff'd*, 86 S.W.2d 1077 (Tex. 1935). "A reservation is a taking back by the grantor of a part of the interest being granted." *Bupp v. Bishop*, No. 04-16-00827-CV, 2018 WL 280408, at *2 (Tex. App.—San Antonio Jan. 3, 2018, pet. denied) (mem. op.). An exception, by contrast, operates to exclude some interest from the grant. *Id.* "'[A]n exception is a mere exclusion from the grant, in favor of the grantor only to the extent that such interest as is excepted may then be vested in the grantor and not outstanding in another.'" *Pich*, 302 S.W.2d at 650 (quoting *Klein*, 67 S.W.2d at 915); *see also Patrick v. Barrett*, 734 S.W.2d 646, 648 n.1 (Tex. 1987). Thus, an exception vests the excepted interest in the grantor only if "the interest excepted is not outstanding in another." *Goss v. Addax Mins. Fund, L.P.*, No. 07-14-00167-CV, 2016 WL 1612918, at *4 (Tex. App.—Amarillo Apr. 21, 2016, pet. denied) (mem. op.).

summary judgment, the district court found that the 1999 Deed did not reserve or except the mineral estate from the conveyance. We agree.

DISCUSSION

The trial court resolved this case on the parties' cross-motions for summary judgment. "When we review cross-motions for summary judgment, we consider both motions and render the judgment that the trial court should have rendered." *Coastal Liquids Transp., L.P. v. Harris Cty. Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001) (citing *Commissioners Ct. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997); *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988)). Each party bears the burden of establishing that it is entitled to judgment as a matter of law. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). We construe unambiguous deeds—like any other legal instrument—as a matter of law. *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991). An ambiguous deed, however, presents a question of fact, and summary judgment in such a context is inappropriate. *See Gore Oil Co. v. Roosth*, 158 S.W.3d 596, 599 (Tex. App.—Eastland 2005, no pet.) (explaining that if written instrument remains reasonably susceptible to more than one meaning after established rules of interpretation have been applied, then instrument is ambiguous and extrinsic evidence is admissible to determine its true meaning). Whether a deed is unambiguous is a question of law that we review de novo. *Combest v. Mustang Mins., L.L.C.*, 502 S.W.3d 173, 185 (Tex. App.—San Antonio 2016, pet. denied). In determining whether a deed is ambiguous, we look at the deed as a whole and consider the entire deed to harmonize and to give effect to all the provisions of the deed so that none will be rendered meaningless. *Id.* An ambiguity does not arise merely because the parties advance conflicting interpretations of the deed's language; rather, for an ambiguity to

exist, both parties' interpretations must be reasonable. *Hausser v. Cuellar*, 345 S.W.3d 462, 467 (Tex. App.—San Antonio 2011, pet. denied). If a deed is worded in such a way that it can be given a definite or certain legal meaning, then the deed is unambiguous. *Combest*, 502 S.W.3d at 185; *Hausser*, 345 S.W.3d at 467. The Rosses and the Flowers both argued that the 1999 Deed is unambiguous.

Our primary duty when construing an unambiguous deed is to ascertain the intent of the parties from all of the language within the four corners of the deed. *Luckel*, 819 S.W.2d at 461. Thus, we "harmonize all parts of the deed," understanding that the "parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement." *Id.* at 462. "Even if different parts of the deed appear contradictory or inconsistent," we must "strive to harmonize all of the parts, construing the instrument to give effect to all of its provisions." *Id.* We determine the parties' intent from the whole document, not by the presence or absence of a certain provision. *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451, 457 (Tex. 1998).

Deeds are construed to confer upon the grantee the greatest estate that the terms of the instrument will allow. *Combest*, 502 S.W.3d at 180; *Ladd v. Du Bose*, 344 S.W.2d 476, 480 (Tex. App.—Amarillo 1961, no writ). A deed will pass whatever interest the grantor has in the land, unless it contains language showing the intention to grant a lesser estate. *Trial v. Dragon*, 593 S.W.3d 313, 322 (Tex. 2019) (citing *Sharp v. Fowler*, 252 S.W.2d 153, 154 (Tex. 1952)). A warranty deed will pass all of the estate owned by the grantor at the time of the conveyance unless there are reservations or exceptions that reduce the estate conveyed. *Combest*, 502 S.W.3d at 179; *Graham v. Prochaska*, 429 S.W.3d 650, 655 (Tex. App.—San Antonio 2013, pet. denied) (citing *Cockrell v. Texas Gulf Sulphur Co.*, 299 S.W.2d 672, 675 (Tex. 1956)). Property

"excepted" or "reserved" under a deed is never included in the grant and is something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of the grant. *King v. First Nat'l Bank*, 192 S.W.2d 260, 262 (Tex. 1946). Reservations must be made by clear language, and courts do not favor reservations by implication. *Griswold v. EOG Res., Inc.*, 459 S.W.3d 713, 717 (Tex. App.—Fort Worth 2015, no pet.); *see also Sharp*, 252 S.W.2d at 154. Exceptions must identify, with reasonable certainty, the property to be excepted from the larger conveyance. *Sharp*, 252 S.W.2d at 154.

The 1999 Deed is a general warranty deed that, absent an exception or reservation, operated to convey the entire estate that the Rosses owned at the time of the conveyance. The 1999 Deed granted "the real property described on attached Exhibit 'A'," "to have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Grantee." Exhibit A to the 1999 Deed does not contain any limitation on the property granted but instead describes it as "[a]ll that certain tract or parcel of land, lying and being situated in Fayette County, Texas," followed by a reference to a recorded deed covering the Property as well as a metes and bounds description of the Property.

The Rosses maintain that the following provision in the 1999 Deed operates to reserve or except the mineral estate from the conveyance:

> This conveyance, however, is made and accepted subject [to] any OIL, GAS AND OTHER MINERALS, including, but not limited to BUILDING STONE, LIMESTONE, CALICHE, SURFACE SHALE, WATER, SAND, GRAVEL AND LIGNITE, IRON AND COAL and to any and all validly existing encumbrances, conditions and restrictions, relating to the hereinabove described property as now reflected by the records of the County Clerk of Fayette County, Texas.

"The words 'subject to,' used in their ordinary sense, mean subordinate to, subservient to or limited by." *Kokernot v. Caldwell*, 231 S.W.2d 528, 531 (Tex. App.—Dallas 1950, writ ref'd). In general, the principal function of a "subject-to" clause in a deed is to protect a grantor against a claim for breach of warranty when some mineral interest is already outstanding. *Wenske v. Ealy*, 521 S.W.3d 791, 796 (Tex. 2017). The "subject-to" clause in the 1999 Deed references not only "oil, gas and other minerals" but also "any and all validly existing encumbrances." This indicates an intent to avoid a breach of warranty and an over-conveyance problem, rather than a clear attempt to reserve a mineral interest. Moreover, adopting the construction sponsored by the Rosses would result in the "subject-to" clause functioning inconsistently as a reservation with regard to the oil, gas, and other minerals but as a limitation of warranty with regard to existing encumbrances, conditions, and restrictions. It is also undisputed that the Rosses had executed at least two oil, gas, and mineral leases before executing the 1999 Deed. Construing the "subject-to" clause as a limitation on the warranty rather than the conveyance results in the clause functioning in a consistent manner to protect the Rosses against a claim for breach of warranty arising from some already outstanding mineral or other interest. Nothing in the four corners of the 1999 Deed shows that the parties intended the "subject-to" clause to operate differently or to serve a purpose other than informing the grantees that other outstanding interests potentially burdened the property conveyed. Finally, the "subject-to" clause also references building stone, limestone, caliche, surface shale, water, sand, gravel, lignite, iron, and coal. The Rosses do not dispute that the 1999 Deed conveyed all of their rights in the surface estate. Reading the "subject-to" clause as a reservation would, however, result in the 1999 Deed reserving valuable portions of the surface estate as well. *See Reed v. Wylie*, 597 S.W.2d 743, 747 (Tex. 1980)

(substance near the surface is part of surface estate if any reasonable method of production, at time of conveyance, would consume, deplete, or destroy surface).

The Rosses rely principally on *Bass v. Harper*, 441 S.W.2d 825 (Tex. 1969), to support their argument that the "subject-to" clause operates to reserve or except the mineral estate from the conveyance. In *Bass*, the deed provided that (1) the grantor granted, sold, and conveyed to the grantee all of that certain undivided one-half interest in a tract of land; (2) described the land; (3) stated "this Grant is Subject to the Mineral Reservation contained in the following deeds": (4) listed nine deeds from various people to the grantor in which royalty interests had been reserved, including the page and volume number showing the deeds had been recorded; and (5) included a habendum clause and a warranty clause. *Id*. at 826. Both the trial court and the court of appeals construed the words in the deed as limiting the warranty and not the grant, and therefore, concluded that the mineral interests had been conveyed to the grantee. *Id*. at 828. The supreme court, however, concluded that the words in the deed showed that the parties intended to limit the grant rather than the warranty, and therefore, the outstanding interests were not conveyed. *Id.* at 827-28.

The Texas Supreme Court recently re-examined *Bass*. *See Wenske*, 521 S.W.3d at 794-95. Although the supreme court did not overrule *Bass*, it did state that *Bass*'s reasoning "should remain limited to the specific wording of the instrument in that case" and that "courts and practitioners should view *Bass* as limited to the specific language at issue in that case." *Id.* The deed in *Bass* provided: "This Grant is Subject to the Mineral Reservation contained in the following Deed(s)." 441 S.W.2d at 826. The specific language at issue in *Bass* is different from the language of the 1999 Deed in at least two material respects. First, the 1999 Deed provides that the "conveyance, however, is *made and accepted* subject to" as opposed to the *Bass* deed,

which stated that the "Grant *is* Subject to." (Emphases added.) This phrasing evinces an intent that the grantees were accepting the title with knowledge of outstanding interests. *See e.g.*, *Bibb v. Nolan*, 6 S.W.2d 156, 157 (Tex. App.—Waco 1928, writ ref'd) (effect of recitation in deed that property was conveyed subject to existing oil and gas leases was that grantee accepted title with knowledge that said lease contracts were in existence and that grantors to that extent would not be liable on their warranty). Second, the object of the term "subject to" in the *Bass* deed was a previously created mineral reservation; thus, the supreme court did not construe the "subject to" clause as itself *creating* a reservation or describing an exception. *Bass*, 441 S.W.2d at 827 (describing deed as limiting grant to exclude already "outstanding mineral royalty interests"). The *Bass* mineral reservation itself had already been created and described in other instruments, and the supreme court interpreted the deed to exclude that previously created reservation from the grant. *See id.* at 826 ("In short, the instrument from Bass to Miller [] was subject to mineral reservations 'in the following deeds.'"). Here, the Rosses ask this court to interpret the "subject to" language to create a reservation, a result not compelled by *Bass* and inconsistent with the supreme court's holding in *Cockrell*, 299 S.W.2d at 676 ("There is nothing in the use of the words 'subject to,' in their ordinary use, which would even hint at the creation of affirmative rights." (quoting *Kokernot*, 231 S.W.2d at 531)). Because *Bass* is limited to the specific wording of the instrument in that case, which differs from that of the 1999 Deed, we conclude that it is not controlling here. *See Wenske*, 521 S.W.3d at 795.

Considering the four corners of the 1999 Deed, we conclude that the "subject-to" clause does not exclude anything from the conveyance but instead merely refers to encumbrances on the Property and explains and clarifies the nature of the title being conveyed. *See Texas Indep. Expl., Ltd. v. Peoples Energy Prod.-Tex. L.P.*, No. 04-07-00778-CV, 2009 WL 2767037, at *5

(Tex. App.—San Antonio Aug. 31, 2009, no pet.) (mem. op) (conveying land "subject to" outstanding interests is means of providing notice that outstanding interests may affect grantee's title); *Freeman v. Southland Paper Mills, Inc.*, 573 S.W.2d 822, 824 (Tex. App.—Beaumont 1978, writ ref'd n.r.e.) (concluding that "subject-to" clause in deed did not expressly except any portion of conveyed land but merely made conveyance subject to any leases or other instruments affecting land). As discussed, this construction allows for a consistent and harmonious interpretation of the "subject to" clause in the 1999 Deed.

We conclude that the unambiguous 1999 Deed evinces the Rosses' intent to convey all their interest in the real property, including their interest in the mineral estate, to the Churches. The "subject-to" clause does not constitute clear language of reservation nor does it identify, with reasonable certainty, property excepted from the larger conveyance. *See Sharp*, 252 S.W.2d at 154; *Commerce Tr. Co.*, 284 S.W.2d 920, 921 (Tex. App—Fort Worth 1955). Therefore, we conclude that the trial court did not err in granting the Flowers' motion for summary judgment and rendering a take-nothing judgment against the Rosses.

CONCLUSION

For the reasons stated in this opinion, we affirm the trial court's judgment.

Thomas J. Baker, Justice

Before Justices Baker, Triana, and Smith

Affirmed

Filed: March 10, 2021